

Memorandum 64-34

Subject: Study No. 34(L) - Uniform Rules of Evidence (Existing Statutes in Part IV of Code of Civil Procedure)

This memorandum presents an analysis of Part V (pages 106-134) of Professor Degnan's research study on Part IV of the Code of Civil Procedure. Unless otherwise indicated, references are to the Code of Civil Procedure.

Section 2042

This section is discussed on pages 106-110 of the research study. The consultant recommends that Section 2042 be retained without substantive change. The staff suggests that Section 2042 be compiled in the Evidence Code, to read as follows:

The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.

The proposed section would permit the court to depart from the order of proof specified by the provisions of C.C.P. Sections 597 and 607 or Penal Code Sections 1093 and 1094. (See Research Study at pages 107-108.) Would it be desirable to substitute the following for the second sentence of the proposed section: "Ordinarily, unless otherwise provided by rule of law, the order of proof in civil actions should be as provided in Section 607 of the Code of Civil Procedure and in criminal actions shall be as provided in Penal Code Sections 1093 and 1094."

The Commission already has further revised Revised Rule 63(9)(b), discussed on page 109 of the research study, to eliminate the problem mentioned by the research consultant.

Section 2043

The research study discussed this section on pages 110-111.

The consultant recommends that this section be retained without substantive change. The staff suggests that Section 2043 be compiled in the Evidence Code, without substantive change, to read as follows:

(a) Subject to subdivisions (b) and (c), if either party requires it, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination so that such witness will not hear the testimony of other witnesses.

(b) A party to the action may not be excluded under this section.

(c) If a person other than a natural person is a party to the action, it is entitled to have one of its officers, employees, or agents, to be designated by its attorney, present.

Section 2044

This section is discussed on pages 111-114 of the research study.

The research consultant recommends that this section be retained in substance. The staff has added the last sentence of Section 2044 to Section 352 as subdivision (b). See new Evidence Code. We suggest that this subdivision be approved by the Commission.

The remaining portion of Section 2044 could be added to the Evidence Code by a section reading substantially as follows:

The judge shall exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth, as may be.

Although this section seems to be a specific application of Section 352 (Revised Rule 45), it seems desirable to retain it. We have not included the last clause of the first sentence of Section 2044 because we do not believe it is needed. If it is desired to retain the last clause, it could be worded "but, subject to this section and to Section 352, the parties may put such pertinent and legal questions as they see fit."

Section 2045

This section is discussed on page 114 of the research study.

We suggest that this section be split into two sections to read:

(a) "Direct examination" is the examination of a witness by the party producing him.

(b) "Cross-examination" is the examination of a witness produced by an adverse party.

Unless the judge otherwise directs, the direct examination of a witness must be completed before the cross-examination begins.

Section 2046

This section is discussed on pages 115-116 of the research study.

The consultant recommends that this section be retained in substance.

The staff recommends that the section be retained in the following form:

A leading question is one which suggests to the witness the answer which the examining party desires. On direct examination, a leading question is not allowed except in the sound discretion of the court, under special circumstances, where it appears that the interests of justice require it.

Section 2047

We suggest that the language set out on page 118 of the research study be incorporated into the Evidence Code, subject to later revision based on a staff report (to be prepared) concerning the rule that should apply in a case where the witness refreshes his memory with a writing that he cannot produce at the trial.

Section 2048

This section is discussed on pages 118-124 of the research study. We suggest you read these pages with care.

The research consultant recommends that a significant substantive change be made in this section. He believes that the law limiting cross-examination of a witness to facts stated "in his direct examination or connected therewith" unduly limits the right of cross-examination. See research study at pages 120-122. The consultant does not recommend wide open cross-examination; instead, he recommends the adoption of the so-called "Michigan rule." Accordingly, he recommends that Section 2048 be revised to read in substance as follows:

(a) Except for those witnesses comprehended by [C.C.P. Section 2055] and subject to subdivision (b), a witness called by one party may be cross-examined by the adverse party on any fact or matter relevant to the case in chief of the party calling the witness.

(b) The defendant in a criminal action may be cross-examined only to the extent permitted by Section 947.

The research study presents other alternatives for Commission consideration.

If the Commission wishes to retain the present California law on the permissible scope of cross-examination, the consultant recommends that Section 2048 be compiled in the Evidence Code without substantive change.

Section 2049

This section is discussed on pages 124-125 of the research study.

The Commission concluded that this section should be repealed in its tentative recommendation on Witnesses. The consultant concurs.

Section 2050

This section is discussed on pages 125-126 of the research study.

The consultant recommends that the section be retained and the staff suggests that it be compiled in the Evidence Code in the following form:

A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be cross-examined by the adverse party. After the examinations on both sides are concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld in the exercise of the sound discretion of the court.

Section 2051

This section is discussed on page 126 of the research study.

The consultant recommends that the section be repealed and the Commission concluded that the section should be repealed in its tentative recommendation on Witnesses (because it is superseded by Revised Rule 22).

Section 2052

This section is discussed on pages 126-127 of the research study.

The consultant recommends that the section be repealed and the Commission concluded that the section should be repealed in its tentative recommendation on Witnesses (because it is both modified and superseded by Revised Rule 22).

Section 2053

This section is discussed on page 127 of the research study.

The consultant recommends that the section be repealed and the Commission concluded in its Witnesses Recommendation and Extrinsic Policies Recommendation that the section should be repealed (because it is superseded by Revised Rule 20 and Revised Rules 46 and 47).

Section 2054

This section is discussed on pages 127-129 of the research study.

The consultant recommends that the section be revised to read as follows and be compiled in the Evidence Code:

Except as provided in [Rule 22(1)--impeachment] and [C.C.P. Section 2047--refreshing memory], before a witness is examined concerning a writing, the writing must be shown to him and be made available for examination by the adverse party.

Section 2055

This section is discussed on pages 130-133 of the research study.

The research consultant recommends that this section be compiled in the Evidence Code substantially as follows (significant changes are indicated by strikeout and underscore):

A party to the record of any civil action, or a person for whose immediate benefit such action is prosecuted or defended, or the directors, officers, superintendent, member, agent, employee, or managing agent of any such party or person, or any public employee of a ~~municipal corporation~~ public entity ~~which~~ when such public entity is a party to the action, may be examined by the adverse party at any time during the case in chief of the adverse party as if under cross-examination, subject to the rules applicable to the examination of the other witnesses. The party calling such adverse witness is not bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence. ~~A party, when so called, may be examined by his own counsel, but only as to matters testified to on such examination.~~

~~A witness other than a party, when so called, may be cross-examined by counsel for a party adverse to the party calling such witness, but only as to matters testified to on such examination.~~

A person examined under the provisions of this section may be re-examined as to the matters testified to on such examination by counsel for any party adverse to the party who called that person as a witness.

See the research study for a discussion of the reasons for the proposed amendments and for an alternative amendment.

Section 2056

This section is discussed on pages 133 and 134 of the research study.

The research consultant recommends that this section be revised to read as follows and be compiled in the Evidence Code:

A party examining a witness is entitled to answers responsive to his questions, and answers which are not responsive shall be stricken on that party's motion.

Respectfully submitted,

John H. DeMouilly
Executive Secretary